UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	)	Civil Action No. 18-cv-117 (EGS)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff hereby moves for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that plaintiff is entitled to judgment as a matter of law. Defendants cannot provide any legal basis for withholding the requested records under FOIA. Accordingly, judgment should be entered for plaintiff.

In support of this motion for summary judgment, plaintiff submits the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, Plaintiff's Counter-Statement of Material Facts, and the Declarations of David Michaels, Margaret (Peg) Seminario, and Eric Frumin.

Respectfully submitted,

/s/ Sean M. Sherman
Sean M. Sherman (D.C. Bar No. 1046357)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW

Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

Dated: June 29, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	)	Civil Action No. 18-cv-117 (EGS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Sean M. Sherman (D.C. Bar No. 1046357)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

June 29, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

INTRODUCTION

Plaintiff Public Citizen brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel defendants United States Department of Labor and the Occupational Safety and Health Administration (collectively, OSHA) to produce summary injury and illness records that some employers are required to submit electronically to OSHA pursuant to a final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29624 (May 12, 2016) (the Final Rule). In announcing the Final Rule, OSHA stated that it would make the submitted information available to the public in a searchable online database, and OSHA explained that the requested information is not confidential commercial information exempt from disclosure under FOIA Exemption 4. Indeed, following a 2004 federal district court decision, *see New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004), OSHA has consistently released the type of data sought here. Now, in a complete reversal, OSHA asserts that Exemption 4 allows it to delay for four years the release of the requested information to avoid potential harm to a government interest. The Court should reject OSHA's novel theory and order OSHA to produce the requested records.

First, Exemption 4 protects "commercial or financial information" that is "confidential," and the requested information is neither. The information is required by law to be posted in a conspicuous area in the workplace and to be made available on request to employees, former employees, and their representatives. For more than a decade, OSHA has had a policy of publicly disclosing such data and has repeatedly stated that the requested information "is not of a kind that would include confidential commercial information" within the meaning of Exemption 4. 81 Fed. Reg. at 29658.

Second, OSHA's Exemption 4 claim finds no support in the statute or any precedent binding on this Court. OSHA proposes a new standard that would expand the definition of "confidential" to allow an agency to delay the release of information that third parties are required to submit, if release of the information might embarrass the submitters such that they would be tempted to violate the reporting requirement in the future, thereby reducing the effectiveness of an agency program that uses the data. Exemption 4 cannot be stretched so broadly.

Third, OSHA cannot prevail even under its new theory. OSHA relies almost entirely on factual assertions in the Declaration of Thomas Galassi, but many of those assertions are based on industry comments that were considered and rejected by OSHA during the recent rulemaking. Other assertions in the Galassi Declaration are directly contradicted by the rulemaking record, and by the declarations that plaintiff has submitted in support of its cross-motion.

Finally, if some portions of the requested records were exempt from disclosure, those fields could be redacted and the remainder produced. OSHA's conclusory assertion that the requested information is not segregable should be rejected.

For these reasons, the Court should grant plaintiff's motion for summary judgment and deny OSHA's motion.

BACKGROUND

I. OSHA's Recordkeeping and Reporting Requirements

A. The OSH Act and OSHA recordkeeping regulations

The Occupational Safety and Health Act (OSH Act) was enacted in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working condition," 29 U.S.C. § 651(b), by, among other means, "providing for appropriate reporting procedures … [that] will help achieve the objectives of this Act and accurately describe the nature of the

occupational safety and health problem," *id.* § 651(b)(12). To accomplish this goal, the Act mandates that "[e]ach employer shall make, keep and preserve, and make available" records of workplace injuries and illnesses "as the Secretary [of the Department of Labor] … may prescribe by regulation as necessary or appropriate for the enforcement of [the Act] or for developing information regarding the causes and prevention of occupational accidents and illnesses." *Id.* § 657(c)(1); *see also id.* § 673(a), (e). The Act further directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." *Id.* § 657(c)(2); *see id.* § 673(e). The Secretary has delegated these statutory responsibilities and authorities to OSHA. *See Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 867–68 (D.C. Cir. 2002); Seminario Decl. ¶ 8.

Accordingly, since 1971, OSHA has promulgated regulations "to require employers to record and report work-related fatalities, injuries, and illnesses." 29 C.F.R. § 1904.0; *see* 81 Fed. Reg. at 29625 (citing 36 Fed. Reg. 12612 (July 2, 1971)); Seminario Decl. ¶ 9; Frumin Decl. ¶ 12. OSHA's current regulations mandate that employers with more than 10 employees in most industries keep records of occupational injuries and illnesses at their establishments. *See* 29 C.F.R. part 1904; 81 Fed. Reg. at 29624. The regulations make clear that reporting work-related injuries and illnesses does "not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits." 29 C.F.R. § 1904.0.

OSHA regulations provide that covered establishments must record each recordable employee injury and illness on a "Log" (the OSHA Form 300) and must prepare a supplementary "Incident Report" that provides additional details about each case recorded (the OSHA Form 301). As relevant to the FOIA requests at issue in this case, at the end of each year, employers are

required to prepare a summary report derived from the information in the Log, the "Annual Summary Form," on the OSHA Form 300A. *See* 81 Fed. Reg. at 29624; 29 C.F.R. § 1904.32(b)(5). On the Form 300A, establishments must provide summary information about work-related injuries and illnesses divided into three main categories, each with multiple sub-categories:

- Number of Cases – total number of (1) deaths, (2) cases with days away from work, (3) cases with job transfers or restrictions, and (4) other recordable cases.
- Number of Days – total number of (1) days away from work and (2) days of job transfer or restriction.
- Injury and Illness Types – total number of (1) injuries, (2) skin disorders, (3) respiratory conditions, (4) poisonings, (5) hearing loss, and (6) other illnesses.

See Edens Decl. Ex. M (sample Form 300A) (ECF No. 14-3). Form 300A also requires each establishment to provide basic information (name, address, industry code) and employment data (annual average number of employees and totally hours worked by all employees in the prior year). *See id.*

The OSH Act gives OSHA enforcement power, authorizing it to issue citations and to assess penalties for violations of the Act and of the standards and regulations promulgated thereunder, as well as for failure to correct violations within the period permitted for correction. 29 U.S.C. §§ 658, 659, 666. In 2011, for example, OSHA issued citations and penalties up to $5,000 to 93 employers who failed to respond to the agency's request for their injury and illness records under the then-existing OSHA Data Initiative (ODI). *See* Frumin Decl. ¶ 31.

B. Public disclosure of injury and illness data

Since 1971, OSHA has required establishments to post publicly the annual summary injury and illness data in a conspicuous place in the workplace, and it currently mandates that they do so for three months of the year following the year covered by the records. *See* 29 C.F.R. § 1904.32(a)(4), (b)(5)–(6); *New York Times*, 340 F. Supp. 2d at 396; Seminario Decl. ¶ 9.

Establishments must also preserve OSHA Forms 300, 301, and 300A for five years, during which time the forms are required to be produced at no charge to employees, former employees, and their representatives. *See* 29 C.F.R. §§ 1904.33, 1904.35.

To provide OSHA a more effective way of targeting its resources, as well as for research and other purposes, federal agencies and advisory groups beginning in the 1980s recommended that OSHA develop a system requiring establishments to provide the agency with injury and illness data from the OSHA forms. *See* Seminario Decl. ¶¶ 12–14; Frumin Decl. ¶¶ 3–4. Before 2016, OSHA received summary injury and illness data on an *ad hoc* basis through two methods: (1) onsite inspections and (2) from 1996 to 2012, through the ODI, an annual survey through which OSHA requested Form 300A data from approximately 80,000 large establishments in certain high-hazard industries. *See* 81 Fed. Reg. at 29627; Seminario Decl. ¶¶ 17–18; Frumin Decl. ¶¶ 13–14. OSHA used the ODI data for its High Rate Letter outreach programs and site-specific targeting (SST) enforcement programs. *See* 81 Fed. Reg. at 29627; Seminario Decl. ¶¶ 17–18.

Through the High Rate Letter outreach program, OSHA has sent letters to the establishments that the ODI data revealed to have the highest injury and illness rates, notifying them of their high-rate status. Seminario Decl. ¶ 18. OSHA has identified a smaller subset of those employers for inclusion in the SST enforcement program. *See New York Times*, 340 F. Supp. 2d at 396; Seminario Decl. ¶ 18. From the time OSHA initiated the ODI in 1996, OSHA has disclosed in response to FOIA requests the list of employers receiving high rate letters and has done so shortly after the letters were sent. Seminario Decl. ¶ 19. OSHA disclosed this list without objection, and did so before the agency initiated its SST enforcement program. *Id.* OSHA also issued press releases announcing the mailing of "High Rate Letters" and provided a website listing the employers who had received those letters, giving the public a list of the establishments that had

the highest reported injury and illness rates. *See id.* ¶¶ 19–20; OSHA Press Release, *US Labor Department's OSHA notifies 15,000 workplaces nationwide of high injury and illness rates* (Mar. 9, 2010), https://www.osha.gov/news/newsreleases/national/03092010. Thus, for example, for the 2006 ODI data collection based on 2005 injury data, OSHA made public the list of high rate employers receiving notification letters in March 2007, and OSHA initiated its SST enforcement program based on the 2005 data in May 2007. Seminario Decl. ¶¶ 19–20.

Although, beginning in 1996, OSHA made the list of high rate employers publicly available, the agency initially took the position that the establishment-specific rates of injuries and illnesses derived from ODI data for the 80,000 establishments included in the ODI—called the Lost Work Day Illness and Injury (LWDII) rate, and calculated through dividing total employee hours by the number of incidents—was exempt from disclosure under FOIA Exemption 4. *See New York Times*, 340 F. Supp. 2d at 401. While OSHA did not claim that the injury and illness data itself was commercial or confidential, it argued that, when combined with the summary injury and illness data that establishments were required to publicly post in the workplace, the LWDII rates could be used to reverse engineer the total number of employee hours worked, which the agency claimed was confidential commercial information, the release of which could cause competitive injury. *See id.* In the *New York Times* case, the court held that the information did not fall within the scope of Exemption 4. *See id.*; Seminario Decl. ¶ 20; Frumin Decl. ¶¶ 17–19. The court relied, among other things, on the fact that OSHA itself did not actually regard the information as confidential commercial information, but instead required employers to publicly post hours in the same way that they must post injury and illness data. *See New York Times*, 340 F. Supp. 2d at 402.

Since the *New York Times* decision in 2004, OSHA has publicly posted on its website all of the injury and illness rate data obtained through the ODI and, in response to FOIA requests, OSHA has produced the injury and illness data it obtained from onsite inspections. *See* 81 Fed. Reg. at 29628, 29658; 78 Fed. Reg. 67253, 67259 (Nov. 8, 2013); *see* Seminario Decl. ¶ 20; Frumin Decl. ¶¶ 23–26.[1] Like the High Rate Letter list, OSHA made all of the ODI rate data public while it was using that data in its SST enforcement programs. Seminario Decl. ¶¶ 22–23. For example, on November 16, 2009, OSHA posted the 2007 injury and illness ODI rate data on its website while it was using the same data for its SST program. *Id*. ¶ 23.

During the life of the ODI, OSHA never indicated that the routine release of the list of high injury rate establishments or the summary injury and illness rate data for all establishments collected under the ODI undermined or impaired OSHA's enforcement or recordkeeping programs. *See* Michaels Decl. ¶¶ 19–22; Seminario Decl. ¶ 34; Frumin Decl. ¶ 30. Further, employers did not object to OSHA's public disclosure of this information. *See* Michaels Decl. ¶ 20 (Assistant Secretary of Labor for OSHA from 2009 to 2017 stating that asked OSHA staff whether employers complained about OSHA's posting this data and was told by the person in charge of the posting that "in all, only a single employer complained" and that employer did so because he "claimed the data were inaccurate").

[1] On its website, OSHA included an explanatory note with the ODI data providing context for the data quality: "While OSHA takes multiple steps to ensure the data collected is accurate, problems and errors invariably exist for a small percentage of establishments. OSHA does not believe the data for the establishments with the highest rates on this file are accurate in absolute terms. Efforts were made during the collection cycle to correct submission errors, however some remain unresolved. It would be a mistake to say establishments with the highest rates on this file are the 'most dangerous' or 'worst' establishments in the Nation." 81 Fed. Reg. at 29649-50.

In addition, OSHA has, since 2015, required employers to report "severe injuries" within 24 hours, *see* 79 Fed. Reg. 56129 (Sept. 18, 2014), and, since 1994, has required employers to report fatalities within 8 hours, *see id.* at 56141. The agency posts establishment-specific information about work-related fatality and severe injury reports on its website on a rolling basis. *See* OSHA, Fatality Inspection Data, https://www.osha.gov/dep/fatcat/dep_fatcat.html; OSHA, Severe Injury Reports, https://www.osha.gov/severeinjury/index.html.

II. OSHA's Electronic Reporting and Public Disclosure Rulemaking

A. The rulemaking process

In 2010, OSHA began to explore the development of an electronic injury reporting system to replace the ODI. Seminario Decl. ¶ 25. The head of OSHA at the time, Dr. David Michaels, conceived of the proposal and was involved in every aspect of its development. *See* Michaels Decl. ¶¶ 5–7. As he explains, "[f]rom its inception, the primary objective of this rule was to encourage employers to make efforts to reduce injuries and illnesses, without OSHA increasing inspections." *Id.* ¶ 9. Because "the OSHA enforcement staff is small and can inspect a very small proportion of covered establishments in any given year," *id.*, OSHA sought to "appl[y] well accepted principles of behavioral sciences to prevent occupational injuries" by using "public disclosure of information [to] change[] behavior of corporations" without increased inspections, *id.* ¶ 10.

On May 5, 2010, OSHA issued an advance notice of proposed rulemaking (ANPRM) on developing an electronic injury reporting system. 75 Fed. Reg. 24505 (May 5, 2010). In the ANPRM, OSHA stated it was exploring whether making public the "up-to-date, establishment-specific, injury/illness-specific electronic data collected by an improved and modernized OSHA recordkeeping system … would encourage innovative ideas and allow employers, employees, and researchers to participate in improving occupational safety and health." *Id.* at 24507.

In November 2013, OSHA issued a proposed rule to require certain establishments to submit electronically to OSHA the information on Forms 300, 301, and 300A that they were already required to maintain. *See* 78 Fed. Reg. at 67253. The agency explained that "[t]he main purpose of this rulemaking is to improve workplace safety and health through the collection and use of timely, establishment-specific injury and illness data." *Id.* at 67258. OSHA further stated that, to incentivize employers to increase safety at their workplaces and to allow for more effective research into work-related injuries and illnesses, it intended "to make public all of the collected data that neither FOIA … nor specific Part 1904 provisions prohibit from release." *Id.* at 67262. Speaking on behalf of OSHA, Dr. Michaels explained during a teleconference that the new proposed rule was "not an enforcement initiative," but rather was designed to help OSHA obtain better data and to better target its activities "by identifying the employers who most need our free consultants, our educational materials and our health and safety inspections." OSHA, *Press Teleconference on Proposed New Rule to Improve Tracking of Workplace Injuries and Illnesses* (Nov. 7, 2013), https://www.osha.gov/news/teleconf/11072013.

On May 12, 2016, OSHA issued the Final Rule to require the electronic submission of workplace injury and illness records. *See* 81 Fed. Reg. at 29623. The Rule requires employers with 250 or more employees in select industries to submit annually to OSHA the three forms they were already required to maintain under part 1904 (Forms 300, 301, and 300A). *Id.* at 29668; *see* 29 C.F.R. § 1904.41. [2] The rule also requires certain establishments with fewer employees annually to submit the Form 300A electronically to the agency and mandates that, upon notification from

[2] For 2016, covered employers were only required to submit Form 300A. 81 Fed. Reg. at 29668. Form 300 and 301 records are not at issue in this case.

OSHA, any establishment must electronically submit requested information. *See* 29 C.F.R. § 1904.41(a)(2)–(3).

As suggested in the proposed rule, OSHA stated that it would make all of the fields in Form 300A available to the public in a searchable online database on its website. 81 Fed. Reg. at 29632. OSHA concluded that public disclosure of injury and illness data will "encourage employers to prevent injuries and illnesses among their employees through several mechanisms": (1) pressuring employers to make improvements to support reputations as good places to work and do business with; (2) allowing employers to compare their safety and health performance within the industry and benchmark their performance; (3) helping employees compare their own workplaces to others and choose safer workplaces; (4) permitting investors to identify investment opportunities in firms with low injury and illness rates; (5) aiding the public to make better informed decisions about current and potential places with which to conduct business; and (6) helping customers who believe that low injury rates correlate with high production quality to purchase appropriate products. *Id.* at 29630–31.

The agency further determined that disclosure and access to the data would improve public and private research on the distribution and determinants of workplace injuries and illnesses, helping to prevent workplace injuries and illnesses from occurring. *See id*. at 29631. OSHA also noted that workplace health and safety professionals and groups representing employers and workers could also use the data to improve safety. *See id.* at 29631–32. It explained that public disclosure of the data would "improve the accuracy of the recorded data." *Id.* at 29632. Specifically, the agency determined that if employers know "that their data must be submitted to the Agency and may also be examined by members of the public, then they will pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and

accuracy of the information and to better compliance with [the annual summary requirement in] § 1904.32." *Id.*

OSHA rejected the position of some commenters who suggested that the data should not be disclosed because it was misleading and subject to misinterpretation. *See id.* at 29648–49. The agency explained that it "does not agree that the publishing of recordkeeping data under this final rule will be misleading or that the public will misinterpret the data. The recordkeeping data represent real injuries and illnesses … that occurred at the workplace and were recordable under part 1904. While they do not, by themselves, provide a complete picture of workplace safety and health at that workplace, employers are free to post their own materials to provide context and explain their workplace safety and health programs." *Id.* at 29649. OSHA noted that when it published the data, it would "provide links to resources, such as industry rates from [the Bureau of Labor Statistics], to help the public put the information in context," and would also "include language explaining the definitions and limitations of the data, as OSHA has done since the Agency began publishing establishment-specific injury and illness data from the OSHA Data Initiative." *Id.* at 29649. OSHA included the full-text of the explanatory note it uses in the ODI context in the preamble to the Final Rule. *Id.* at 29649–50; *see supra* p.7 n.1.

During the rulemaking process, OSHA did not express concern that releasing the Form 300A data would undermine its recordkeeping requirements or impair its SST enforcement program. *See* Seminario Decl. ¶ 35–36.

B. OSHA intended to disclose the annual summary injury and illness data quickly after receipt.

"All stakeholders understood" that, to accomplish its goal of using public disclosure to "encourage employers to abate hazards," Michaels Decl. ¶ 24, OSHA's intention was to publicly disclose the summary injury and illness data from the Form 300A shortly after its submission,

see id. ¶ 12. OSHA did not intend to delay the release of the data for enforcement purposes. *See id.* ¶ 24.

OSHA's intent was clear throughout the rulemaking process. Before the rulemaking began, during a webchat OSHA held in 2010, Dr. Michaels explained that OSHA believed that "moving to a more modern, electronic system will provide information to employers and workers that can be used in real time to investigate and prevent injuries." Laura Walter, *OSHA Agenda Includes Injury and Illness Prevention Program*, EHS Today (Apr. 27, 2010), http://www.ehstoday.com/standards/osha/osha-agenda-injury-illness-prevention-program-4520. During a press teleconference held on the day the proposed rule was announced, Dr. Michaels was asked "how quickly" the information would be posted after submission. *See* OSHA, *Press Teleconference on Proposed New Rule to Improve Tracking of Workplace Injuries and Illnesses* (Nov. 7, 2013), https://www.osha.gov/news/teleconf/11072013. While noting that the rulemaking was only in the proposal stage, Dr. Michaels explained that because the ODI data was not finalized for publication until several years after it was current, "the information … really gets held for a long time before we put it up," and is "not as useful." *Id.* He stated that "the more quickly we can post it publicly the more useful it will be for everybody involved…. And so we're certainly committed to looking at the ways we can do that best." *Id.* Dr. Michaels further explained that the only cause for a delay to public release of the data would be making sure the data did not include personally identifiable information (PII) about individual injuries, *id.*—a concern that does not apply to the summary data in the Form 300A, *see* 81 Fed. Reg. at 29632 ("The 300A annual summary does not contain any personally-identifiable information.").

In the notice of proposed rulemaking, OSHA noted that a key benefit of the rule would be increased workplace safety as a result of making "timely" establishment-specific injury and illness

information available to the public, which would encourage employers to improve safety. 78 Fed. Reg. at 67256. "By 'timely,' OSHA meant as close to the date of submission as possible, since the objectives of the rule … would not be attained if the data posted were stale." Michaels Decl. ¶ 23; *see, e.g.*, 78 Fed. Reg. at 67264 (noting that while the agency would consider a phase-in period where it would accept paper forms, if adopted, such a system would "impede OSHA's ability to make the data public in a timely way, because the data on the paper forms would have to be entered manually into the electronic data system" before publication).

The agency explained that it was considering whether to require establishments to submit Form 300A data on a quarterly or annual basis. 78 Fed. Reg. at 67264. Commenters addressing this point make clear their understanding that the submissions would be posted publicly shortly after submission. For example, some commenters objected to quarterly reporting because of concern that it would lead to underreporting, as employers would be "unlikely to record close cases because, in many instances, striking them later may be impossible as the information has already been reported *and posted publicly by OSHA*." 81 Fed. Reg. at 29634 (emphasis added). Similarly, the Association of Union Constructors commented that quarterly reporting would leave employers with "no method of recourse if the employer is found not at fault *once the raw data is public*," and "could impose punitive consequences to the contractor if the public or customers are reviewing their data *in real time*." *Id.* (emphasis added). Other commenters suggested that quarterly reporting offered little benefit because it would not result in the data becoming public faster than annual reporting. *See id.* (recounting comments noting that "the delay for OSHA to scrub the data [of PII before publication] will likely obviate any perceived 'timeliness' benefit OSHA might make in attempting to justify quarterly rather than annual data submission").

In the Final Rule, OSHA agreed with commenters suggesting that annual submission would be preferable to quarterly submission, to assure accuracy and lessen the burden on the agency. *Id.* OSHA explained that only the need to remove PII would delay publication of the data. *See id.*; *see also id.* at 29635 ("As noted elsewhere in this preamble, OSHA will use existing software to remove personally identifiable information before posting data on the publicly-accessible Web site.").

In July 2016, shortly after OSHA issued the Final Rule, OSHA submitted a supporting statement to the Office of Management and Budget (OMB) related to the agency's pending information collection request for the data electronically submitted pursuant to the Rule. *See* OMB Information Collection Request Documents, Supporting Statement A (July 26, 2016), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1218-002 (hereafter Supporting Statement A). As part of the supporting statement "outlin[ing] plans for tabulation and publication" and providing the "time schedule for the entire project, including … publication dates," OSHA explained that it intended to publish the records in real-time, subject only to delays for removing personally identifiable information:

> The data will be made available to the public *as it is collected*. It is OSHA's intent to publish the data *as quickly as possible*, however, prior to publication OSHA will ensure the data does not include Personally Identifiable Information (PII). The time required to clean the data will be dependent on the quantity of the data collected and the resources available to clean the data. OSHA does not anticipate publishing any complex analyses of the data.

Supporting Statement A, at 22 (emphasis added). OSHA did not indicate that there would be any other delay to the release of the data. *See id.* On July 29, 2016, OMB approved OSHA's request. *See* OMB, Notice of OMB Action (July, 29, 2016), https://www.reginfo.gov/public/do/DownloadNOA?requestID=273998.

Overall, throughout the rulemaking process, OSHA made no suggestion that it planned to delay the release of the establishment-specific data to the public for any reason other than removing PII. Michaels Decl. ¶ 24. OSHA never indicated that it intended to delay the release of the collected data for several years, and never indicated that it would delay the release of the data to reduce the potential impact of the public disclosure on OSHA's recordkeeping or targeting programs. *See id.*

C. OSHA concluded that Exemption 4 does not apply to the annual summary injury and illness data.

In the notice of proposed rulemaking, OSHA noted with respect to FOIA that it had made an initial determination that "[t]he information required to be submitted under the proposed rule is not of a kind that would include confidential commercial information" because "[t]he information is limited to the number and nature of injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates, i.e., the number of employees and the hours worked at an establishment." 78 Fed. Reg. at 67263. OSHA explained that "[d]etails about a company's products or production processes are not included on the OSHA recordkeeping forms, nor do the forms request financial information." *Id.* The agency also noted that the Mine Safety and Health Administration (MSHA), the Federal Railroad Administration (FRA), and the Federal Aviation Administration (FAA) all post injury and illness data on their websites. *See id.* at 67260.

OSHA invited "[m]embers of the public … to express their views on this issue during the comment period." *Id.* at 67263. In response, some commenters raised concerns with respect to publication of the collected data, arguing that some of the data constituted confidential commercial information that was exempt from disclosure under Exemption 4. 81 Fed. Reg. at 29633, 29657–58. Others disagreed. *See id.* at 29660.

OSHA concluded that "the information required to be submitted by employers under this final rule is not of a kind that would include confidential commercial information." *Id.* at 29658; *see id.* at 29653 ("[T]he final rule will not result in … the release of records containing … confidential commercial and/or proprietary information."); *id.* at 29659 ("Again, OSHA wishes to emphasize that it will post injury and illness recordkeeping information collected by this final rule consistent with FOIA."). The agency explained that the Secretary had "carefully considered the issues … and concluded that the information on the OSHA recordkeeping forms, including the number of employees and hours worked at an establishment, is not confidential commercial information." *Id.* at 29658 (citing the notice of proposed rulemaking). "OSHA's recordkeeping regulation does not require employers to record information about, or provide detailed descriptions of, specific brands or processes that could be considered confidential commercial information." *Id.* at 29659. OSHA noted that many employers routinely disclose information about the number of employees at an establishment, and that part 1904 already requires employers to publicly post Form 300A in the workplace for three months and to disclose the form to current employees, former employees, and their representatives. *Id.* at 29658; *see also id.* at 29660 ("[I]nformation on the 300A annual summary, such as the establishment's name, business address, and NAICS code, are already publicly available."). OSHA emphasized that "[t]he purpose for the publication of recordkeeping data under this final rule is to disseminate information about occupational injuries and illnesses," and "OSHA agree[d] with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information." *Id.* at 29660.

Further, OSHA explained that, although it had previously held a contrary view with respect to certain data in Form 300A regarding the average number of employees and total number of hours worked, it had come to agree with the *New York Times* decision that those records do not

involve confidential commercial information. *Id.* at 29658. "Accordingly, since the *New York Times* decision in 2004, OSHA has had a consistent policy concerning the release of information on the OSHA Form 300A." *Id.*

III. Public Citizen's FOIA Requests and OSHA's Responses

From October 2017 through February 2018, Public Citizen submitted four FOIA requests (the Requests) to DOL seeking the records submitted to OSHA under the Final Rule from August 1, 2017, through January 31, 2018. *See* Edens Decl. ¶¶ 4, 6, 10, 12, Exs. A, C, G, I. The requests were identical except for the timeframe for the records sought, which continued to roll forward to cover recently submitted records. Public Citizen requested:

> All records submitted to [OSHA] from August 1, 2017 to [January 31, 2018], through OSHA's internet-based injury tracking application pursuant to the Final Rule "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301.

See id. Exs. A, C, G, I.

In letters dated November 17, 2017, and February 20, 2018, DOL stated that OSHA had identified 237,000 records of OSHA Form 300A data submitted to the DOL from August 1, 2017 through January 31, 2018, but that all of the records were being withheld in their entirety under FOIA Exemption 7(E). *Id.* Exs. E, K.[3] The agency claimed that release of the records would "disclose OSHA's techniques and procedures for law enforcement investigations":

[3] The first letter, in response to Public Citizen's requests covering August 1, 2017 through October 31, 2017, included only 23,416 records. *See* Edens Decl. ¶ 14 n.1. The second letter, in response to Public Citizen's requests covering August 1, 2017 through January 31, 2018, included 237,000 records, but overlapped with the records described in OSHA's first response. *See id.* OSHA claims that the responsive records include 214,574 Form 300A summaries from 2016 and 22,426 Form 300A summaries from 2017. *See* Galassi Decl. ¶ 8 & n.3 (ECF No. 14-4).

> Exemption 7(E) of the FOIA affords protection to all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." As stated in the preamble to the Improve Tracking of Workplace Injuries and Illnesses final rule (see 81 FR 29624), OSHA plans to use the establishment-specific data for enforcement targeting purposes. Disclosure of the data before and while it is being used to select establishments for inspection would in turn disclose OSHA's techniques and procedures for law enforcement investigations. Thus, OSHA has determined the data submitted under the electronic reporting requirements are exempt from disclosure while they are being used for enforcement targeting purposes, and the Agency must deny your request in full.[4]

Eden Decl. Exs. E, K. OSHA did not claim that the records contained confidential commercial or financial information.

By letters dated December 12, 2017 and February 27, 2018, Public Citizen appealed the agency's decision to withhold the Form 300A records under FOIA Exemption 7(E). *See* Edens Decl. Exs. F, L. Public Citizen's appeals explained that the records are not exempt under FOIA Exemption 7(E) because the records were not compiled for law enforcement purposes, the release of the records would not disclose techniques and procedures for law enforcement investigations or prosecutions, and disclosure of the records could not reasonably be expected to risk circumvention of the law. *Id.* Public Citizen received no response to either appeal.

Public Citizen then brought this lawsuit. On June 1, 2018, OSHA moved for summary judgment. In its memorandum in support of summary judgment, OSHA abandoned its position that the records are exempt under FOIA Exemption 7(E). Defs. Mem. 2 n.1. Instead, OSHA asserted, for the first time, and contrary to its longstanding policy and the determination in the

[4] DOL further stated that the agency was not collecting Forms 300 or 301 at this time, citing 29 C.F.R. § 1904.41(c)(1). Public Citizen does not challenge DOL's failure to provide Form 300 or Form 301 records.

Final Rule, that the Form 300A data is exempt under Exemption 4 as confidential commercial or financial information. *See id.* at 2.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All reasonable inferences should be drawn in favor of the non-movant. *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996). "FOIA cases typically and appropriately are decided on motions for summary judgment." *Pinson v. U.S. Dep't of Justice*, 160 F. Supp. 3d 285, 292 (D.D.C. 2016) (internal quotation marks and citations omitted).

ARGUMENT

FOIA is intended to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), by ensuring "that the public has access to all government documents, subject to only nine specific limitations, to be narrowly interpreted." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). If the government cannot "carry its burden of convincing the court that one of the statutory exemptions appl[ies]," the requested records must be released to the plaintiff. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

I. Annual Summaries of Workplace Injuries and Illnesses Do Not Fall Within the Scope of Exemption 4.

FOIA Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure

motif expressed in the statute." *Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 324 (D.C. Cir. 1989). The issues here are whether the information is "commercial" and, if so, whether it is "confidential." The information is neither.[5]

A. The requested records do not contain "commercial" information.

Information is "commercial" under Exemption 4 "if, in and of itself, it serves a commercial function or is of a commercial nature." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (internal quotation marks and citation omitted). OSHA asserts that information is "'commercial or financial' if it relates to business or trade," Defs. Mem. 11, but "not every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4." *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Rather, this Court has rejected as "plainly incorrect" the assertion that "a company has a 'commercial interest' in all records that relate to every aspect of the company's trade or business." *Public Citizen v. HHS*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013) (internal quotation marks and citations omitted).

The summary information at issue here is "limited to the number and nature of injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates." 78 Fed. Reg. at 67263; *see* 66 Fed. Reg. 5916, 5933 (Jan. 19, 2001) ("OSHA recordkeeping forms only shows three things: (1) that an injury or illness has occurred; (2) that the employer has determined that the case is work-related (using OSHA's definition of that term); and (3) that the case is non-minor, i.e., that it meets one or more of the OSHA injury and illness

[5] Although OSHA repeatedly uses the phrase "commercial or financial," Defs. Mem. 10–11, OSHA does not argue that the withheld data is financial. OSHA concedes that the requested records are not trade secrets and does not argue that the records are privileged. Plaintiff agrees that the records were obtained from a person.

recording criteria."). OSHA previously explained that this information "does not constitute confidential commercial information," because "[d]etails about a company's products or production processes are not included on the OSHA recordkeeping forms, nor do the forms request financial information." 78 Fed. Reg. at 67263; *see* 81 Fed. Reg. at 29659–60. Similarly, in *Chicago Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998), the requestor sought records concerning the number, severity, and types of in-flight medical emergencies on commercial airlines. In responding, the agency redacted anything that could identify the airline that provided the data, claiming that it was commercial information within the meaning of Exemption 4 because the events occurred during revenue-producing operations. The court rejected the agency's claim that the information was "commercial," finding that it did not bear a sufficiently "direct relationship to the operations of a commercial venture." *Id.* at *3. The same is true for the summary injury and illness data at issue here.

Although OSHA cites a handful of cases in which information was found to be commercial, such as information about wages, prices, goods, and customers, none of the cases OSHA cites involve information similar to that at issue here; OSHA does not claim otherwise.[6] Rather, OSHA describes the information at issue and then, without analysis, states that such data "is clearly within the definition of commercial or financial information under Exemption 4." Defs. Mem. 11. "Merely labeling information as 'commercial or financial' in nature does not satisfy the

[6] *See* Defs. Mem. at 11 (citing *M/A-Com Info. Sys., Inc. v. U.S. Dep't of Health & Human Servs.*, 656 F. Supp. 691, 692 (D.D.C. 1986) (company's accounting and internal procedures); *Merit Energy Co. v. U.S. Dep't of Interior*, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) (information on oil and gas leases, prices, quantities and reserves); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (business practices regarding the sale of power); *FlightSafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 611 (5th Cir. 2003) (statistical information regarding salaries and wages); *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (insurance applicant's financial status and export plans).

government's burden to provide more than a 'conclusory and generalized allegation' that Exemption 4 applies." *COMPTEL v. FCC,* 945 F. Supp. 2d 48, 58-59 (D.D.C. 2013) (ordering release of documents in their entirety). Because OSHA has failed to demonstrate that the requested information is "commercial," it cannot be withheld under Exemption 4.

B. The requested information is not "confidential."

In addition to not being "commercial," the information at issue is not within the scope of Exemption 4 because it is not "confidential." Indeed, it is difficult to see how the information could be deemed "confidential" under any stretch of the English language, when it is posted in the workplaces and available on request, at no charge, to employees, former employees, and their representatives. *See* 29 C.F.R. §§ 1904.32–1904.33, 1904.35. The Exemption 4 test applied in the D.C. Circuit confirms this conclusion.

1. The D.C. Circuit, sitting *en banc*, has distinguished between tests of confidentiality under Exemption 4 based on whether the information was voluntarily submitted or required. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 874 (D.C. Cir. 1992) (*en banc*). Commercial information required to be submitted to an agency falls within Exemption 4's protection of "confidential" information if "disclosure would be likely either (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 878 (quoting *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974), and confining it to cases of compelled disclosure). Where submission is required, however, "there is a presumption that the Government's interest is not threatened by disclosure because it secures the information by mandate." *Id.*

Here, OSHA does not argue that the data falls within either prong of the *National Parks* test. With regard to the first prong—impairment of government information gathering—the parties agree that OSHA required submission of the data at issue. In this circumstance, "the Government's access to the information normally is not seriously threatened by disclosure." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001). And there is no basis to depart from the usual rule here, where OSHA is well-protected by the penalties for noncompliance with the reporting requirement. *See* 29 U.S.C. §§ 658, 659, 666; Frumin Decl. ¶ 31. Moreover, where courts have found that disclosure of involuntarily submitted information might impair the government's ability to obtain necessary information in the future, the threat was to the quality and extent of information that would be submitted. *See, e.g., Ctr. for Digital Democracy v. Federal Trade Comm'n*, 189 F. Supp. 3d 151, 165 (D.D.C. 2016) (finding potential impairment of agency's ability to gather information where suppliers of information, as a consequence of public disclosure, might narrowly construe agency's reporting rule that "largely left it up to the [submitters] to decide how much information to actually disclose"). By contrast, here, establishments have no discretion with regard to what must be reported on Form 300A.[7]

With regard to the second prong of *National Parks*—substantial competitive harm to the submitter—OSHA "has had a consistent policy," since 2004, in favor of disclosure of the type of information at issue here, 81 Fed. Reg. at 29658, and recognized that disclosure cannot reasonably be expected to cause substantial competitive harm, *see id*. at 29659 ("The basic employee safety

[7] While OSHA does not frame it this way, its argument under its purported "third prong" to *National Parks* requires this Court to first conclude that public disclosure of the Form 300A data would lead submitters to violate the reporting requirement rather than risk embarrassment from the subsequent release of the data. As explained below, because the submission is mandatory and there is no issue of "quality," OSHA cannot satisfy the first prong of *National Parks*, on which OSHA's proposed "program effectiveness" test depends. *See infra* pp. 28–29.

and health data required to be recorded do not involve trade secrets, and public availability of such information would not enable a competitor to obtain a competitive advantage."); *see also New York Times*, 340 F. Supp. 2d at 396.

2. Although it does not argue that either prong of the *National Parks* test is satisfied, OSHA urges this Court to extend the reach of Exemption 4 to encompass a "program effectiveness" interest that allows an agency to withhold information as "confidential" under Exemption 4 if it believes that withholding it "serves a valuable purpose and is useful for the effective execution of its statutory responsibilities." *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983). The D.C. Circuit has not adopted that extension, and this Court should decline to do so.

As an initial matter, OSHA is wrong to assert that the D.C. Circuit has "conclusively recognized the existence of a 'third prong' under *National Parks* and adopted the 'persuasive' reasoning of the First Circuit, holding that Exemption 4 protects a 'governmental interest in administrative efficiency and effectiveness.'" Defs. Mem. 13 (quoting *Critical Mass*, 975 F.2d at 879). In *Critical Mass*, the D.C. Circuit recognized that the two prongs of the *National Parks* test are not necessarily exclusive, and noted that an earlier panel decision—which it overruled—had adopted the First Circuit's conclusion that Exemption 4 protects a governmental interest in program effectiveness. *Critical Mass*, 975 F.2d at 879. The court did not, however, offer an opinion as to whether such an interest falls within the scope of Exemption 4. To the contrary, "the Court of Appeals has *never held* that FOIA Exemption 4 protects a government interest in administrative efficiency and effectiveness." *Ctr. for the Study of Servs. v. U.S. Dep't of Health and Human Servs.*, No. 14-498 (GK), 2016 WL 6835461, at *5 (D.D.C. Aug. 16, 2016) (stating that the same

argument that OSHA makes here is "flat out wrong"), *rev'd on other grounds*, 874 F.3d 287 (D.C. Cir. 2017).

OSHA cites several district court decisions that it says added a program effectiveness prong to the *National Parks* test for determining whether requested information is confidential within the meaning of Exemption 4, s*ee* Defs. Mem. 13–14, but the decisions it cites are neither binding nor persuasive. In *Allnet Commc'n Servs., Inc. v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992), the court considered program effectiveness in the context of information that was voluntarily provided, not a required submission. The decisions in *Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 52 (D.D.C. 2002), and *Judicial Watch*, 108 F. Supp. 2d at 30, discussed program effectiveness, but only *after* having found the requested material exempt. And the court in *Hodes v. Department of Housing & Urban Development*, 532 F. Supp. 2d 108, 117 (D.D.C. 2008), mentioned a program effectiveness test but did not apply it. In *Ruston v. Department of Justice*, 521 F. Supp. 2d 18, 20-21 (D.D.C. 2007), a pro se prisoner sought proprietary test questions and answers, the release of which would have harmed the business interests of the test developers, and the court found that the plaintiff had offered "no meaningful opposition" to the defendant's showing that the materials were protected under Exemption 4. The court neither mentioned nor applied a program effectiveness test. Similarly, in *Judicial Watch, Inc. v. Department of Commerce*, 337 F. Supp. 2d 146, 170 (D.D.C. 2004), the court found the defendant's Exemption 4 withholdings valid under the competitive harm and impairment prongs of *National Parks*, and neither mentioned nor applied a program effectiveness test. 337 F. Supp. 2d at 169–70.

In any event, a governmental interest in "administrative efficiency and effectiveness" provides no basis for establishing that information is "confidential" within the meaning of

Exemption 4, because it finds no support in the statutory language or the policies on which FOIA rests. "[T]he purpose of the FOIA is 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979) (quoting S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965)). Accordingly, the Supreme Court has admonished courts to reject any construction of FOIA that "would run counter to Congress' repeated rejection of any interpretation … which would allow an agency to withhold information on the basis of some vague 'public interest' standard." *Id.* at 354 (citations omitted); *see Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010).

Thus, in *Merrill*, the Supreme Court rejected the agency's claim that, under Exemption 5, FOIA conferred "general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately." 443 U.S. at 353. The Court explained that the agency's position, if accepted, "would allow an agency to withhold any memoranda … whenever the agency concluded that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest,'" which would "leave little, if anything, to FOIA's requirement of prompt disclosure." *Id.* at 354. And in *Bloomberg*, the Second Circuit rejected the identical argument in the Exemption 4 context, explaining that incorporating an interest in "program effectiveness" into Exemption 4 "would give impermissible deference to the agency, and would be analogous to the … standard rejected by the Supreme Court in [*Merrill*]." *Bloomberg*, 601 F.3d at 150 (citing *Merrill*, 443 U.S. at 354). As the Second Circuit explained, "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine

'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'" *Id.* (citation omitted).

Accordingly, the Court should reject OSHA's request to stretch the meaning of confidential beyond its natural bounds and instead maintain this Circuit's longstanding reading "through the simple device of confining the provision's meaning to its words." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (rejecting government's expansive reading of Exemption 2).

C. OSHA's assertion that disclosure of the data will impair program effectiveness is contradicted by the record.

Not only is "program effectiveness" not pertinent to its Exemption 4 claim, but OSHA in any event fails to establish that release of the requested records would impair OSHA's programs. In the Final Rule, OSHA determined that the real-time public disclosure of the summary injury and illness data in the Form 300As will improve the agency's programs and is consistent with FOIA. *See supra* pp. 8–11, 15–16. The agency determined that public disclosure of the Form 300A data would "improve the accuracy of the recorded data" because if employers know "that their data must be submitted to the Agency and may also be examined by members of the public, then they will pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and accuracy of the information and to better compliance with § 1904.32." 81 Fed. Reg. at 29632. OSHA similarly determined that public disclosure of the records in real-time will also improve workplace safety itself by "encourage[ing] employers to prevent injuries and illnesses among their employees" through a variety of mechanisms, including the social, behavioral, and economic incentivizes that will accompany the public disclosure of the records. *Id.* at 29629–31; *supra* pp.8–10. As Dr. Michaels, the architect of the Final Rule, explains, the Rule's "objective is to encourage employers to voluntarily change their behavior in the absence of an OSHA inspection," and "[p]ublic disclosure of the collected data is at the heart of the rule

and is fundamental to its objective of reducing workplace injury and illness." Michaels Decl. ¶ 14; *see also id.* ¶¶ 9–14.

Rather than confront the agency's reasoned conclusions about the importance and effects of public disclosure as stated in the Final Rule, OSHA ignores them. Relying on a few comments to the proposed rule (that OSHA addressed and rejected in the Final Rule), the agency claims that releasing the annual summary injury and illness records will (1) reduce compliance with the mandatory recordkeeping and electronic reporting regulations, which will, in turn, (2) impair the effectiveness of its recordkeeping and enforcement targeting programs. OSHA's arguments fail as a matter of law and fact.

First, relying on "public comments and statements" made during and after the rulemaking process, Galassi Decl. ¶ 13 (ECF No. 14-4), OSHA claims that employers, especially those with high injury and illness rates, will choose to violate the mandatory electronic reporting regulations rather than submit their data to OSHA for public disclosure, because OSHA's release of their summary injury and illness data will "cause unfair and irreparable harm to employers' reputations" because the data will be misinterpreted. Defs. Mem. 17–21. OSHA's claim that its enforcement program will be impaired thus depends on its assertion that public disclosure of the Form 300A data will reduce compliance with the mandatory reporting requirement in the Final Rule. In other words, OSHA's "third prong" argument incorporates the "impairment" prong of *National Parks*. As explained above, however, because the electronic submission in the Final Rule is mandatory, and the submitters have no discretion regarding the information required by the Form 300A, OSHA cannot satisfy the *National Parks* impairment prong. *See supra* pp. 22–23. Moreover, "Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) (citing *Occidental*

Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir.1989) and *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987)). But at bottom, OSHA's position embraces reputational harm as a basis to withhold the injury and illness records. Because neither noncompliance with a mandatory reporting standard nor reputational harm is satisfactory ground for withholding records under Exemption 4, OSHA cannot now skirt these defects by rebranding its argument a "third prong."

Second, as a factual matter, OSHA considered and rejected concerns about public misinterpretation of the data and subsequent reputational harm when it promulgated the Final Rule. *See* 81 Fed. Reg. at 29648–49 ("[OSHA] does not agree that the publishing of recordkeeping data under this final rule will be misleading or that the public will misinterpret the data."); *id.* at 29683 ("OSHA is not aware of damage to the reputations of establishments or firms from other, similar data collection efforts."). The agency noted that many agencies provide establishment-specific injury and illness data to the public without the concomitant harms suggested by commenters, among them MSHA, the FRA, and the FAA. *See* 81 Fed. Reg. at 29656.[8]

Indeed, OSHA's own long experience disclosing the same type of data without reputational harm or reduced compliance with the reporting requirement led OSHA to reject these comments and weakens its position here. *See id.*; *see also* Michaels Decl. ¶ 27 ("[M]any of those [comments] repeated by Mr. Galassi[] were rejected by OSHA on the basis of the totality of the evidence, including other comments and OSHA's previous experience collecting and posting similar data.").

[8] During a public hearing on the proposed rule, one commenter relied on by Mr. Galassi claimed to be aware of specific instances of unjustified criticism as a result of public disclosure of ODI data. *See* Frumin Decl. ¶ 34. When asked by OSHA to substantiate the claim in its written comments, the commenter was unable to do so, instead providing a conclusory statement that it was "aware of instances." *Id.* ¶ 35.

In the decades preceding the Final Rule, the agency disclosed the same type of data obtained through the ODI that it has collected under the Final Rule and provided the data in response to FOIA requests and on its website. *See supra* pp. 4–8. Practically no employers complained about these disclosures and the disclosures did not impair OSHA's recordkeeping and reporting programs. *See* Michaels Decl. ¶¶ 19–22; Frumin Decl. ¶ 30.[9]

Although a few employers have not complied with OSHA's reporting requirement, the agency has been able to use citations and penalties effectively to enforce compliance. Frumin Decl. ¶ 31. For example, in 2011, when establishments were aware that OSHA intended to publish the ODI data and high-rate list, only about 100 of approximately 80,000 establishments that were asked by OSHA to submit ODI data were cited for failure to respond. *See id.* Accordingly, as Dr. Michaels concluded, "[t]he evidence is strong that routine release of these data in the past did not impair compliance with the recordkeeping," Michaels Decl. ¶ 21, and "there is no reason to believe that it will do so in the future," *id.* Thus, OSHA did not raise, at any time during the rulemaking process, a concern that releasing data under the Final Rule would undermine recordkeeping.

OSHA also asserts that, to avoid public misinterpretation of the data, and therefore to better assure compliance with the recordkeeping requirement, the agency determined in the Final Rule that it would release the summary injury and illness data only if accompanied by an explanation,

[9] Although an agency's declarant is entitled to a presumption of good faith, *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), Galassi's declaration should be given no weight, given his failure even to acknowledge OSHA's long history of public disclosure of these types of records, OSHA's conclusion in the Final Rule that these records are not exempt from disclosure, and his reliance on comments that the agency rejected. Indeed, every material point in his declaration is contradicted by evidence in the record. *See* Pls. Counter-Statement of Material Facts as to Which There is a Genuine Issue ¶¶ 27–28, 34, 37–40, 47–49, 54–76, 84–98, 100–110.

and that OSHA currently lacks the resources to prepare an explanation because its resources are devoted to developing an SST program. *See* Defs. Mem. 19. OSHA noted in the Final Rule that when it published the data, it would "provide links to resources, such as industry rates from [the Bureau of Labor Statistics], to help the public put the information in context," and "include language explaining the definitions and limitations of the data." 81 Fed. Reg. at 29649–50. Contrary to OSHA's claim here, however, the agency nowhere suggested in the Final Rule that release of the summary data was contingent on these explanatory materials. Further, OSHA indicated that the explanatory note would mirror the note that it already includes with the existing public database of ODI data. *See id.*; Galassi Decl. ¶ 17; *see also see* OSHA, Establishment Specific Injury & Illness Data (OSHA Data Initiative), https://www.osha.gov/pls/odi/establishment_search.html#explanatory. Because OSHA already includes the identical note with the existing public ODI database, the agency's claim that it currently lacks the resources to prepare an explanatory note is wholly implausible. *See* Michaels Decl. ¶¶ 25–26.

OSHA further claims that to avoid reputational harms to establishments, and thus to better assure their compliance with the recordkeeping requirement despite public disclosure of the data, the agency has always intended to release the summary data *four years* after its submission. Defs. Mem. 19. OSHA claims that it inadvertently failed to note the four-year delay in the Final Rule. *Id*. No contemporaneous evidence indicates that OSHA intended for a four-year delay (or any delay) based on enforcement concerns. The rulemaking record is replete with references to the importance of releasing the information while it was "timely," including OSHA's concern that even a delay to publication from receiving the records on an annual (rather than quarterly) basis would harm worker safety. *See supra* pp. 11–14. Everyone involved in the rulemaking process understood that OSHA intended to release the summary injury and illness data in "real time,"

Michaels Decl. ¶ 12, and "as quickly as possible," *id.* ¶ 24. OSHA informed OMB shortly after the Final Rule was promulgated that "[t]he data will be made available to the public as it is collected." Supporting Statement A, at 22. The only delay OSHA ever mentioned was to redact PII—a concern that is irrelevant to the summary data in the Form 300A. *See* 81 Fed. Reg. at 29632; Seminario Decl. ¶¶ 38, 40. Indeed, a four-year delay would, if accepted, delay publication of the summary data two years *longer* than the lag when the ODI was in effect, which is fundamentally at odds with one of the key motivations for the development of the Final Rule: speed. *See* Michaels Decl. ¶¶ 12, 23.

Having been "responsible for all important decisions involved in proposing and finalizing the rule," *id.* ¶ 7, Dr. Michaels cannot recall ever hearing or discussing any delay to "reduce the impact on targeting" during the rulemaking process, *id.* ¶ 24. "[I]n promulgating this rule it was never OSHA's intent, as asserted by Mr. Galassi, 'to release the data only when it finishes using the data to target employers for inspection.'" *Id.* ¶ 24. "To delay release of these potentially life-saving data for four years is a perversion of the intent of the rule." *Id.*[10]

Third, building on its unsupported premise that public disclosure will cause widespread noncompliance with the electronic reporting requirement, OSHA speculates that "[i]f a high percentage of high-rate employers do not comply with the [Final Rule]," OSHA may not be able to "meet its goals of developing an accurate targeting program that targets employers with the

[10] Galassi claims that a supposedly low response rate for the 2016 data is attributable to both "factors connected to the rollout of the Regulation" as well as "perception by some employers that OSHA would immediately make their responses public." Galassi Decl. ¶ 12. Galassi provides no basis for OSHA's conclusion that the possibility of public disclosure caused a substantial number of establishments to violate the mandatory reporting requirement. This claim is especially unlikely in light of OSHA's experience with the ODI, where noncompliance was not an issue even though the injury data was similarly publicly disclosed. *See* Michaels Decl. ¶¶ 20–22; Frumin Decl. ¶ 31; Seminario Decl. ¶¶ 34, 36.

highest rates." Defs. Mem. 23. OSHA claims that any targeting program it develops would be skewed towards employers with lower injury and illness rates, because those employers would be more likely to comply with the electronic submission requirement. *See id.* 20–23.[11] OSHA's litigation position ignores both that OSHA publicly disclosed the same type of data in the past—through the ODI, High Rate Letter program, severe injury and fatality reports, and FOIA—and experienced none of these negative consequences, *see* Michaels Decl. ¶¶ 19-22; *supra* pp. 4–8, as well as OSHA's reasoned conclusion in the Final Rule that timely public disclosure is a necessary supplement to any potential targeting program, not an impediment. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[A]n [u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."); *United States v. Mead*, 533 U.S. 218, 228 (2001) (explaining that deference is reduced when an agency position lacks consistency).

As discussed above, for decades under the ODI, OSHA made the high-rate list and the injury and illness rate data for all 80,000 establishments publicly available while it was using the data in its SST enforcement programs. *See supra* pp. 4–8; Seminario Decl. ¶¶ 19, 23. The routine release of this data did not impair OSHA's targeting programs. *See* Michaels Decl. ¶¶ 21–22. Based on OSHA's long history of releasing the data under the ODI, there is no reason to believe that release and posting of the summary Form 300A data under the new electronic recordkeeping system—which is exactly the same type of information/data that was submitted under the former

[11] OSHA also makes a cursory claim that because employers will violate the electronic submission requirement rather than risk their reputations, releasing the data will interfere with OSHA's goal of "deterring employers from violating the Regulation." Defs. Mem. 20. Because the submission is mandatory, and because OSHA's past experience with the ODI revealed no increase in noncompliance with the recordkeeping requirement, this objection is without merit. *See supra* pp. 4–8.

ODI—will impair OSHA enforcement efforts. Accordingly, at no time during the rulemaking process for the Final Rule did OSHA indicate that releasing data under the Rule would undermine its enforcement programs. *See* Seminario Decl. ¶ 35.

Moreover, in the Final Rule, the agency recognized that even with the improved targeting that will result from the mandatory electronic submission of injury and illness records by all covered establishments, because the agency "can inspect only a small proportion of the nation's workplaces each year," electronic recordkeeping alone will not lead to greater workplace safety. 81 Fed. Reg. at 29629; Michaels Decl. ¶¶ 9–13. The agency determined that the prompt public disclosure of the injury and illness data was the mechanism by which OSHA could potentially accomplish its goal of increasing workplace safety *writ large*. *See* Michaels Decl. ¶¶ 9–13. As OSHA explained, the agency will only be able to "increase its impact on the many thousands of establishments where workers are being injured or made ill but which OSHA does not have the resources to inspect … through application of advances made in the field of behavioral economics in understanding and influencing decision-making in order to prevent worker injuries and illnesses." 81 Fed. Reg. at 29629. In other words, to the extent that "the release of the data [i]s an attempt to publicly shame employers into compliance," Galassi Decl. ¶ 18, as OSHA determined when it issued the Final Rule, disclosing the records to the public is integral to the success of OSHA's mission to improve workplace safety. Michaels Decl. ¶ 14.[12]

[12] OSHA recognizes that many establishments have already submitted data for 2016 and argues only that those employer would violate the Final Rule "in the future." Defs. Mem. 23. However, should covered establishments that have previously submitted their records fail to do so in the future, OSHA can flag those specific establishments, just as OSHA has done in the past with respect to its citation of programs that did not respond to requests for ODI data. *See* Frumin Decl. ¶ 31.

II. Portions of the Annual Summaries are Reasonably Segregable.

FOIA requires that "[a]ny reasonably segregable portion of [the] record shall be provided to any person requesting such record after deletion of the portions which are exempt," 5 U.S.C. § 552(b), and "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Gray v. U.S. Army Criminal Investigation Command*, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). "The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information." *Mokhiber v. U.S. Dep't of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004). To satisfy its burden, the agency must provide a "detailed justification," and not just make "conclusory statements" to support its segregability determination. *Gray*, 742 F. Supp. 2d at 75 (quoting *Mead Data Cent.*, 566 F.2d at 261).

As OSHA concluded in the Final Rule, nothing in the Form 300A submission constitutes confidential commercial or financial information. But even if some portion of the records were exempt, the records are collected electronically and certain fields could be easily separated and redacted. *See* Michaels Decl. ¶ 28; Seminario Decl. ¶ 43. The agency has provided no detailed justification to withhold the requested records in their entirety. Rather, OSHA's declarations include only two conclusory sentences with respect to segregability. *See* Edens Decl. ¶ 21 ("Segregability is not applicable to the approximately 237,000 records that were withheld, because releasing any of the information requested would hinder compliance or program effectiveness. Any attempt at segregating the information in these documents would provide little or no informational value, because the material is inextricable intertwined.") (footnote citing the entire declaration of Thomas Galassi omitted).

This Court has previously explained that analogous conclusory declarations were "patently insufficient" to satisfy the agency's segregability obligation. *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 296–97 (D.D.C. 2007) (citing *Animal Legal Def. Fund, Inc., v. Dep't of Air Force*, 44 F. Supp. 2d 295, 302 (D.D.C. 1999) (holding conclusory declaration stating solely that no withheld document was "reasonably segregable because it was so intertwined with protected material that segregation was not possible or its release would have revealed the underlying protected material" failed to satisfy the agency's burden)); *see Gray*, 742 F. Supp. 2d at 75 ("Defendants' blanket assertion of non-segregability is contrary to the case law requiring that defendants indicate for each document 'which portions of the document are disclosable and which are allegedly exempt.'"). OSHA's blanket statement does not reflect the narrow and "detailed justifications" that FOIA requires.

CONCLUSION

This Court should grant plaintiff's motion for summary judgment, deny OSHA's motion for summary judgment, and order OSHA promptly to disclose the requested records.

Dated: June 29, 2018

Respectfully submitted,

/s/ Sean M. Sherman

Sean M. Sherman
(D.C. Bar No. 1046357)
Michael T. Kirkpatrick
(D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	)	Civil Action No. 18-cv-117 (EGS)

Plaintiff's Counter-Statement of Material Facts

1. The Occupational Safety and Health Administration ("OSHA") is a subdivision of the United States Department of Labor ("DOL"). Congress created OSHA to ensure the safety and health of workers by, among other things, promulgating and enforcing occupational safety and health standards ("OSHA standards"), as well as recordkeeping regulations "requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." 29 U.S.C. §§ 655, 657. OSHA standards set forth requirements to protect workers from injuries and illnesses in various workplace categories, including: General Industry, Maritime, Construction, and Agriculture. *See* 29 C.F.R. Parts 1910, 1915, 1917, 1918, 1926, and 1928. Ex. 2, Declaration of Thomas Galassi ("Galassi Decl."), ¶ 4.	1. Admitted.
2. One OSHA recordkeeping regulation, the rule to Improve Tracking of Workplace Injuries and Illnesses (the "Regulation"), which was promulgated in 2016, requires certain categories of employers to electronically submit to OSHA, on an annual basis, information from certain recordkeeping	2. Admitted.

forms that OSHA requires be kept by the employers, including OSHA Form 300A Summary of Work-Related Injuries and Illnesses.[1] 29 C.F.R. § 1904.41. Each OSHA Form 300A contains information submitted by a specific establishment.[2] Galassi Decl., ¶ 5.	
3. On October 13, 2017, Public Citizen Litigation Group ("Plaintiff") submitted a FOIA request dated October 13, 2017, to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from August 1, 2017 to September 30, 2017, through OSHA's internet-based injury tracking application pursuant to the Final Rule "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Exhibit 1, Declaration of Amanda L. Edens ("Edens Decl."), ¶ 4.	3. Admitted.
4. On October 18, 2017, in an email to Plaintiff, Defendant's component agency, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the October 13, 2017, FOIA request and assigned it tracking number 843089. Edens Decl., ¶ 5.	4. Admitted.
5. On November 2, 2017, Plaintiff submitted a FOIA request dated November 1, 2017, to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from October 1, 2017 to October 31, 2017, through	5. Admitted.

[1] Specifically, the Regulation requires annual electronic submission of information from recordkeeping forms by the following establishments: establishments with 250 or more employees; establishments with 20 or more employees but fewer than 250 employees in designated industries; and upon notification by OSHA. 29 C.F.R. § 1904.41(a).

[2] The Regulation requires employers to submit information from recordkeeping forms for each of their establishments that are subject to the rule. 29 C.F.R. § 1904.41. For example, under the Regulation, a corporation that has four establishments subject to the rule must submit separate information for each establishment.

OSHA's internet-based injury tracking application pursuant to the Final Rule "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 6.	
6. On November 6, 2017, in an email to Plaintiff, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the November 1, 2017, FOIA request and assigning it tracking number 844610. Edens Decl., ¶ 7.	6. Admitted.
7. On November 17, 2017, by letter to Plaintiff, DOL responded to FOIA requests 843089 and 844610. The letter noted that "OSHA has identified 23,416 records of OSHA Form 300A data submitted to the Agency during the period of August 1, 2017 through October 31, 2017. OSHA does not have any records pertaining to OSHA Forms 300 or 301. The Agency is not collecting that information at this time." The November 17, 2017, letter withheld the Form 300A data as exempt from disclosure under Exemption 7(E) of FOIA, stating: "As stated in the preamble to the Improve Tracking of Workplace Injuries and Illnesses final rule (see 81 FR 29624), OSHA plans to use the establishment-specific data for enforcement targeting purposes. Disclosure of the data before and while it is being used to select establishments for inspection would in turn disclose OSHA's techniques and procedures for law enforcement investigations. Thus, OSHA has determined that the data submitted under the electronic reporting requirements are exempt from disclosure while they are being used for enforcement targeting purposes, and the Agency must deny your request in full." Edens Decl., ¶ 8.	7. Admitted.
8. By letter dated December 12, 2017, Plaintiff appealed the agency's decision to withhold the OSHA Form 300A records to the	8. Admitted.

FOIA Appeals Unit within the Office of the Solicitor. Edens Decl., ¶ 9.	
9. On December 18, 2017, Public Citizen Litigation Group ("Plaintiff") submitted a FOIA request dated December 18, 2017, to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from October 31, 2017 to December 18, 2017, through OSHA's internet-based injury tracking application pursuant to the Final Rule "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 10.	9. Admitted.
10. In a December 21, 2017, email to Plaintiff, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the November 1, 2017, FOIA request and assigning it tracking number 847640. Edens Decl., ¶ 11.	10. Admitted.
11. On February 1, 2018, Public Citizen Litigation Group ("Plaintiff") submitted a FOIA request dated February 1, 2018, to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from December 19, 2017 to January 31, 2018, through OSHA's internet-based injury tracking application pursuant to the Final Rule "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 12.	11. Admitted.
12. In a February 2, 2018 email to Plaintiff, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the November 1, 2017, FOIA request and assigning it tracking number 850399. Edens Decl., ¶ 13.	12. Admitted.

13. On February 20, 2018, by letter to Plaintiff, DOL responded to FOIA requests 847640 and 850399. The letter noted that "OSHA has identified 237,000 records[3] of OSHA Form 300A data submitted to the Agency during the period of October 31, 2017 through January 31, 2018. OSHA does not have any records pertaining to OSHA Forms 300 or 301. The Agency is not collecting that information at this time." The February 20, 2018, letter withheld the Form 300A data as exempt from disclosure under Exemption 7(E) of FOIA, stating: "As stated in the preamble to the Improve Tracking of Workplace Injuries and Illnesses final rule (see 81 FR 29624), OSHA plans to use the establishment-specific data for enforcement targeting purposes. Disclosure of the data before and while it is being used to select establishments for inspection would in turn disclose OSHA's techniques and procedures for law enforcement investigations. Thus, OSHA has determined that the data submitted under the electronic reporting requirements are exempt from disclosure while they are being used for enforcement targeting purposes, and the Agency must deny your request in full." Edens Decl., ¶ 14.	13. Admitted.
14. By letter dated February 27, 2018, Plaintiff appealed the agency's decision to withhold the OSHA Form 300A records to the FOIA Appeals Unit within the Office of the Solicitor. Edens Decl., ¶ 15.	14. Admitted.
15. All data responsive to the FOIA Requests are submitted through and captured in OSHA's Injury Tracking Application ("ITA"). The data stored in the ITA are transmitted to the Office of Statistical Analysis ("OSA"), Directorate of Technical Support and Emergency Management on a monthly basis. OSA uploads those records into a Microsoft Access database. OSA searched the database	15. Admitted.

[3] Although FOIA Requests 847640 and 850399 spanned the period of October 31, 2017, through January 31, 2018, in responding OSHA also included in its count the 23,416 records responsive to the previous two FOIA Requests, FOIA Requests 843089 and 844610.

to identify the number of records that were responsive to the FOIA Requests. Edens Decl., ¶ 17.	
16. The search for responsive records in response to FOIA Requests 843089, 844610, 847640, and 850399 produced approximately 237,000 records of OSHA Form 300A data submitted to the Agency during the period of August 1, 2017, through January 31, 2018. Edens Decl., ¶ 18.	16. Admitted.
17. The records consist of information from OSHA Form 300A, "Summary of Work-Related Injuries and Illnesses" completed forms. These forms contain data from establishments on the total numbers of deaths, lost-workday cases, cases resulting in work restriction or transfer, and other recordable cases; as well as the total number of lost or restricted workdays; the classification of cases (injury, skin disorder, respiratory, poisoning, hearing loss, or other illnesses); the number of employees; and the total hours worked. Edens Decl., ¶ 20.	17. Admitted.
18. No records pertaining to OSHA Forms 300 or 301 were found in response to any of the four FOIA Requests, because the Agency is not collecting that information at this time. Edens Decl., ¶ 18.	18. Admitted.
19. The records were withheld in full pursuant to FOIA. Edens Decl., ¶ 19.	19. Admitted that the records were withheld. Denied to the extent defendants claim that the records were lawfully withheld pursuant to FOIA, which is a legal conclusion. As explained below and in plaintiff's memorandum of law, as OSHA has previously concluded, exemption 4 does not apply, and defendants have unlawfully withheld the requested records. *See* 81 Fed. Reg. at 29658.
20. Segregability is not applicable to the approximately 237,000 records that were withheld, because releasing any of the information requested would hinder compliance or program effectiveness. Any attempt at segregating the information in those documents would provide little or no	20. Denied. Because the data are collected electronically, certain fields can easily be separated and redacted and not shared with the public. Michaels Decl. ¶ 28; Seminario Decl. ¶ 43.

informational value, because the material is inextricably intertwined. Edens Decl., ¶ 21.	
21. On January 19, 2018, Plaintiff filed this FOIA litigation addressing FOIA Requests 843089 and 844610. ECF No. 1, Pl.'s Compl.	21. Admitted.
22. On April 16, 2018, Plaintiff filed a "First Amended Complaint" in this FOIA litigation, adding FOIA Requests 847640 and 850399 to the complaint. ECF No. 12, Pl.'s Am. Compl.	22. Admitted.
*	*
	23. Under the final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29623 (May 12, 2016) (the Final Rule), covered establishments are required to submit electronically Form 300A annual summary injury and illness data to OSHA each year. *See* 29 C.F.R. § 1904.41.
	24. Before the Final Rule was issued, from 1996 to 2012, OSHA received injury and illness data through the OSHA Data Initiative (ODI), an annual survey whereby OSHA requested Form 300A data from approximately 80,000 larger establishments in selected high-hazard industries. *See* 81 Fed. Reg. at 29627; Seminario Decl. ¶¶ 17–24.
	25. Before issuance of the Final Rule, "OSHA ha[d] collected [Form 300A] data under the ODI and during OSHA workplace inspections and released them in response to FOIA requests." 81 Fed. Reg. at 29632.
	26. The data OSHA received from establishments through the ODI was the same type of data as the Form 300A data it receives under the Final Rule. *See* 81 Fed. Reg. at 29628; Seminario Decl. ¶ 17.
	27. OSHA used the ODI data for its High Rate Letter outreach programs and site-specific targeting (SST) enforcement programs. 81 Fed. Reg. at 29628; Seminario Decl. ¶¶ 17–18.
	28. OSHA publicly disclosed ODI data while

	it was being used in its SST programs. Seminario Decl. ¶¶ 19, 23.
	29. On November 16, 2009, OSHA posted the 2007 injury and illness data on its website while it was using the same data for its SST program. Seminario Decl. ¶ 23.
	30. Since the *New York Times* decision in 2004, OSHA has had a policy to publicly disclose data it obtained through the ODI proactively on its web site, and to disclose the data it obtained from onsite inspections in response to FOIA requests. *See* 81 Fed. Reg. at 29628, 29658; 78 Fed. Reg. 67253, 67259; Seminario Decl. ¶ 22.
	31. Throughout the life of the ODI, OSHA sent "High Rate Letters" to the establishments the ODI data revealed to have the highest injury and illness rates and also identified a smaller subset of those employers for inclusion in the agency's SST program. *See* Seminario Decl. ¶¶ 17–18; *New York Times Co. v. Dep't of Labor*, 340 F. Supp. 2d 394, 396 (S.D.N.Y. 2004).
	32. From the time the ODI was initiated in 1996, in response to FOIA requests, OSHA disclosed the list of employers receiving High Rate Letters shortly after the letters were sent. Seminario Decl. ¶ 19.
	33. OSHA disclosed this list of employers receiving high rate letters without objection. Seminario Decl. ¶ 19.
	34. OSHA disclosed this list of employers receiving high rate letters before the agency had initiated its SST program of a subset of employers on the list. Seminario Decl. ¶ 19.
	35. For the 2006 ODI data collection based on 2005 injury data, OSHA disclosed the list of high-rate employers receiving notification letters in March 2007, and OSHA initiated its site-specific targeting

	program for that year in May 2007. Seminario Decl. ¶ 19.
	36. OSHA also issued press releases announcing the mailing of "High Rate Letters" and provided a website listing the employers who had received those letters, giving the public a list of the establishments that had the highest reported injury and illness rates. *See* Seminario Decl. ¶ 19; OSHA Press Release, *US Labor Department's OSHA notifies 15,000 workplaces nationwide of high injury and illness rates* (Mar. 9, 2010), https://www.osha.gov/news/newsreleases/national/03092010.
	37. During the period that OSHA released the ODI data to the public and posted it on its website concurrent with its use by OSHA in its SST program, there was no evidence that the routine release of this data undermined or impaired OSHA's enforcement program. Seminario Decl. ¶ 34.
	38. OSHA's routine release of injury and illness data before the issuance of the Final Rule did not impair compliance with the recordkeeping or targeting programs and there is no reason to believe that it will do so in the future. Michaels Decl. ¶ 21.
	39. Before the issuance of the Final Rule, OSHA collected injury and illness data and put it on the web, with virtually no complaints from any employer, or any of the negative consequences that have been claimed in Mr. Galassi's declaration. Michaels Decl. ¶ 22.
	40. Before the issuance of the Final Rule, only one employer objected to OSHA's public disclosure of injury and illness data, and that employer claimed the data were inaccurate. Michaels Decl. ¶ 20.
	41. "The 300A annual summary does not contain any personally-identifiable information." 81 Fed. Reg. at 29632; *see* Seminario Decl. ¶ 40.

	42. "The annual summary form is also posted at workplaces under § 1904.32(a)(4) and (b)(5)." 81 Fed. Reg. at 29632; Seminario Decl. ¶ 9.
	43. The Form 300A must be retained by employers for five years and produced at no charge to employees, former employees, and their representatives. 29 C.F.R. §§ 1904.33, 1904.35.
	44. OSHA has required employers to report "severe injuries" within 24 hours since 2015. *See* 79 Fed. Reg. 56129 (Sept. 18, 2014).
	45. OSHA has required employers to report fatalities within 8 hours since 1994. *See* 79 Fed. Reg. at 56141.
	46. OSHA posts establishment-specific information about work-related fatality and severe injury reports on its website on a rolling basis. *See* OSHA, Fatality Inspection Data, https://www.osha.gov/dep/fatcat/dep_fatcat.html; OSHA, Severe Injury Reports, https://www.osha.gov/severeinjury/index.html.
	47. Prior to this litigation, OSHA had never indicated that the release of the summary injury and illness data obtained from the ODI and inspections impaired compliance with its recordkeeping or targeting programs. *See* Michaels Decl. ¶¶ 20–22; Seminario Decl. ¶¶ 34–36.
	48. At no time during the entire period that the Final Rule was being developed (from 2010–2016), in any public meeting, in any request for comment, in any advanced notice of proposed rulemaking, in any proposed rule or in the Final Rule, did OSHA raise a concern or produce any evidence that releasing data under the new electronic injury reporting rule would undermine recordkeeping or its enforcement programs. Seminario Decl. ¶ 35.
	49. OSHA stated in the Final Rule that "OSHA will make the following data from the various forms available in a

	searchable online database: Form 300A (Annual Summary Form)—All collected data fields will be made available." 81 Fed. Reg. at 29632.
	50. "From its inception, the primary objective of [the Final Rule] rule was to encourage employers to make efforts to reduce injuries and illnesses, without OSHA increasing inspections." Michaels Decl. ¶ 9.
	51. OSHA concluded that "timely" public disclosure of injury and illness data will "encourage employers to prevent injuries and illnesses among their employers through several mechanisms." 81 Fed. Reg. at 29630–31.
	52. The agency further determined that timely disclosure and access to the data would improve public and private research on the distribution and determinants of workplace injuries and illnesses, helping to prevent workplace injuries and illnesses from occurring. *See* 81 Fed. Reg. at 29631.
	53. OSHA also concluded that workplace health and safety professionals and groups representing employers and workers could also use the data to improve safety. *See* 81 Fed. Reg. at 29631–32.
	54. The agency also explained that public disclosure of the Form 300A data would "improve the accuracy of the recorded data." 81 Fed. Reg. at 29632.
	55. The agency determined that if employers know "that their data must be submitted to the Agency and may also be examined by members of the public, then they will pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and accuracy of the information and to better compliance with [the annual summary requirement in] § 1904.32." 81 Fed. Reg. at 29632.
	56. OSHA concluded in the Final Rule that

	the agency "does not agree that the publishing of recordkeeping data under this final rule will be misleading or that the public will misinterpret the data." 81 Fed. Reg. at 29638–49
	57. Many agencies provided establishment-specific injury and illness data to the public, including the Mine Safety Health Administration, the Federal Railroad Administration, and the Federal Aviation Administration. *See* 81 Fed. Reg. at 29632.
	58. OSHA concluded in the Final Rule that the agency "is not aware of damage to the reputations of establishments or firms from other, similar data collection efforts." 81 Fed. Reg. at 29683.
	59. "All stakeholders understood" that in order to accomplish its goal of using public disclosure to "encourage employers to abate hazards," OSHA's intention was always to publicly disclose the summary injury and illness data from the Form 300As shortly after its submission. Michaels Decl. ¶ 24.
	60. Dr. Michaels stressed "in all of [his] public presentations," it was always OSHA's intent to release the data in "real time." Michaels Decl. ¶ 24.
	61. In the proposed rule, OSHA noted that a key benefit of the rule would be increased workplace safety as a result of making "timely" establishment-specific injury and illness information available to the public, which would encourage employers to improve safety. 78 Fed. Reg. at 67256.
	62. OSHA used the phrase "timely" throughout the rulemaking process, and "[b]y 'timely,' OSHA meant as close to the date of submission as possible, since the objectives of the rule … would not be attained if the data posted were stale." Michaels Decl. ¶ 23.
	63. Commenters opposed to quarterly electronic reporting understood that, if

	adopted in the Final Rule, the consequence would be that the data would be publicly posted on a quarterly basis. *See* 81 Fed. Reg. at 29634.
	64. Some of those commenters therefore objected to quarterly reporting because they claimed that it would lead to underreporting, as employers would be "unlikely to record close cases because, in many instances, striking them later may be impossible *as* the information has already been reported *and posted publicly by OSHA*." *See* 81 Fed. Reg. at 29634 (emphasis added and noting other similar comments).
	65. Similarly, the Association of Union Constructors commented that quarterly reporting would leave employers with "no method of recourse if the employer is found not at fault *once the raw data is public*," and "could impose punitive consequences to the contractor if the public or customers are reviewing their data *in real time*." *See* 81 Fed. Reg. at 29634 (emphasis added).
	66. Other commenters objected to quarterly reporting because it would not actually result in the data becoming public much faster than annual reporting. *See* 81 Fed. Reg. at 29634 (recounting comments noting that "the delay for OSHA to scrub the data [of personally identifiable information before publication] will likely obviate any perceived 'timeliness' benefit OSHA might make in attempting to justify quarterly rather than annual data submission.").
	67. OSHA explained throughout the Final Rule that there would be a slight delay to the publication of the data to remove personally identifiable information. *See* 81 Fed. Reg. at 29634; *see also id.* at 29635.
	68. "[I]n promulgating this rule it was never OSHA's intent, as asserted by Mr. Galassi, 'to release the data only when it

	finishes using the data to target employers for inspection.'" Michaels Decl. ¶ 24.
	69. In the Final Rule, OSHA concluded that "the information required to be submitted by employers under this final rule is not of a kind that would include confidential commercial information." 81 Fed. Reg. at 29658; *id.* at 29653 ("[T]he final rule will not result in … the release of records containing … confidential commercial and/or proprietary information."); *id.* at 29659 ("Again, OSHA wishes to emphasize that it will post injury and illness recordkeeping information collected by this final rule consistent with FOIA.").
	70. The agency explained that the Secretary had "carefully considered the issues … and concluded that the information on the OSHA recordkeeping forms, including the number of employees and hours worked at an establishment, is not confidential commercial information." 81 Fed. Reg. at 29658 (citing the proposed rule, 78 Fed. Reg. at 67263).
	71. OSHA concluded that "OSHA's recordkeeping regulation does not require employers to record information about, or provide detailed descriptions of, specific brands or processes that could be considered confidential commercial information." 81 Fed. Reg. at 29659.
	72. OSHA noted that many employers routinely disclose information about the number of employees at an establishment, and that part 1904 already requires employers to publicly post Form 300A in the workplace for three months and to disclose the form to current employees, former employees, and their representatives. 81 Fed. Reg. at 29658; *see also id.* at 29660 ("[I]nformation on the 300A annual summary, such as the establishment's name, business address, and NAICS code, are already publicly

	available.”).
	73. “OSHA agree[d] with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information.” 81 Fed. Reg. at 29660.
	74. “[S]ince the *New York Times* decision in 2004, OSHA has had a consistent policy concerning the release of information on the OSHA Form 300A.” 81 Fed. Reg. at 29660.
	75. In a supporting statement to the Office of Management and Budget in support of an information collation request related to the Final Rule, OSHA stated the following: “OSHA will make public the injury and illness data collected under the proposed 1904.41, as it does now with the injury and illness data the agency currently collects under the ODI (1218-0209). The data will be released under the conditions discussed in questions 7 and 10 of this Supporting Statement. The released data will be tabulated at the establishment level. The data will be made available to the public as it is collected. It is OSHA’s intent to publish the data as quickly as possible, however, prior to publication OSHA will ensure the data does not include Personally Identifiable Information (PII). The time required to clean the data will be dependent on the quantity of the data collected and the resources available to clean the data. OSHA does not anticipate publishing any complex analyses of the data.” *See* OMB Information Collection Request Documents, Supporting Statement A 22 (July 26, 2016), *available at* https://www.reginfo.gov/public/do/

	PRAViewDocument?ref_nbr=201604-1218-002.
	76. In the supporting statement, OSHA further stated twice that "there is no assurance of confidentiality covering information recorded on these forms and documents." *Id.* at 8, 13. *See* OMB Information Collection Request Documents, Supporting Statement A 8, 13 (July 26, 2016), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1218-002.
	77. Dr. David Michaels was the Assistant Secretary of Labor for OSHA from 2009 to 2017. Michaels Decl. ¶ 2.
	78. In his role as Assistant Secretary of Labor for OSHA, he originated the idea that became the electronic reporting rule. Michaels Decl. ¶ 5.
	79. Dr. Michaels was the official who led the regulatory process and was responsible for all important decisions involved in proposing and finalizing the rule. Michaels Decl. ¶¶ 6–7.
	80. From its inception, the primary objective of the Final Rule was to encourage employers to make efforts to reduce injuries and illnesses, without OSHA increasing inspections. Michaels Decl. ¶ 9.
	81. The objective of the Final Rule was to provide information to prospective employees, who would likely prefer to work in safer establishments. Michaels Decl. ¶ 11.
	82. The data would also be useful to current employees, who could see if their injury risk was higher than those of workers at comparable establishments. Michaels Decl. ¶11.
	83. It would also assist employers in benchmarking their safety activities with other employers, something not possible

	for them to do at present. Michaels Decl. ¶ 11.
	84. The intent of the rule from the beginning was to publicly disclose these data as quickly as possible, since stale data would be of little value in addressing the uses listed above. Michaels Decl. ¶ 12.
	85. By "timely," in the Final Rule, OSHA meant as close to the date of submission as possible, since the objectives of the rule, as listed above, would not be attained if the data posted were stale. Michaels Decl. ¶ 23.
	86. Public disclosure of the collected data is at the heart of the rule and one that is fundamental to its objective in reducing workplace injury and illness. Michaels Decl. ¶ 14.
	87. Prompt disclosure of the summary injury data that OSHA is currently collecting will neither lower compliance with the recordkeeping and reporting requirements nor impair the operation of OSHA's targeting program. Michaels Decl. ¶ 19.
	88. During the time Dr. Michaels led OSHA, the agency collected and published on the OSHA website exactly these data for thousands of employers. Michaels Decl. ¶ 19.
	89. Dr. Michaels originated the rule, was at numerous meetings where the rule was discussed and was the final decision-maker on all of the rule's provisions. Michaels Decl. ¶ 24.
	90. During the rulemaking for the Final Rule, OSHA did not consider delaying disclosure of the data in order to reduce the impact on targeting. Michaels Decl. ¶ 24.
	91. In promulgating the rule it was never OSHA's intent, as asserted by Mr. Galassi, "to release the data only when it finishes using the data to target employers for inspection." Michaels Decl. ¶ 24.

	92. In all of his public presentations, Dr. Michaels stressed the value of prompt release of the data, sometimes using the phrase "real time." Michaels Decl. ¶ 24.
	93. All stakeholders understood that the data would be released promptly after collection. Michaels Decl. ¶ 24.
	94. In the Final Rule, OSHA provided the explanatory note that it planned to include with the publication of the data. Michaels Decl. ¶ 25 (citing 81 Fed. Reg. 29649-50 (May 16, 2016)).
	95. The agency went through a notice and comment process, including a public meeting, and received all the comments Mr. Galassi has raised. Michaels Decl. ¶ 27.
	96. The agency considered all of these comments, along with numerous other comments submitted by other employers, trade associations, public health organizations, worker representatives and other members of the public. Michaels Decl. ¶ 27.
	97. All of these were addressed in the rule-making process. Michaels Decl. ¶ 27.
	98. Some of the comments resulted in modifications of the rule, but the others, including many of those repeated by Mr. Galassi, were rejected by OSHA on the basis of the totality of the evidence, including other comments and OSHA's previous experience collecting and posting similar data. Michaels Decl. ¶ 27.
	99. Because the data are collected electronically, certain fields can easily be separated and redacted and not shared with the public. Michaels Decl. ¶ 28; Seminario Decl. ¶ 43.
	100. For decades OSHA routinely and regularly released data to the public collected under the ODI identifying individual firms with high injury rates, initially the list of establishments with the highest injury rates, and starting in 2004, the injury rates of all the firms

	reporting in the ODI. Seminario Decl. ¶ 34.
	101. During that entire time, the data was released to the public, and posted on OSHA's website, concurrent with its use by OSHA in its SST program. Seminario Decl. ¶ 34.
	102. There was no evidence that the collection or the routine release of this data undermined or impaired OSHA's enforcement program. Seminario Decl. ¶ 34.
	103. Based on OSHA's long history of releasing the data under the ODI, there is no reason to believe that release and posting of the summary Form 300A data under the new electronic recordkeeping system—which is exactly the same type of information/data that was submitted under the former ODI—will lower compliance with recordkeeping requirements or impair OSHA enforcement efforts. Seminario Decl. ¶ 36.
	104. Throughout the rulemaking process, there was never any discussion or suggestion during the development or in the issuance of the rule that OSHA planned to delay the release of the establishment-specific data to the public for several years. Seminario Decl. ¶ 38.
	105. OSHA has been collecting and publicly releasing the Annual Summary (Form 200A or 300A) for over 20 years, and making it easily available to the public for most of that time. Frumin Decl. ¶ 30.
	106. OSHA has generally had good employer compliance with its collection of the Annual Summary from employers despite the subsequent public release. Frumin Decl. ¶ 30.
	107. While there have been a marginal few employers that have not complied with OSHA's reporting requirement for Annual Summary data, the agency has

	been able to use citations and penalties effectively to enforce compliance. Frumin Decl. ¶ 31.
	108. In the wake of the 2011 data collection, OSHA investigated non-responders and issued citations to 101 employers who failed to respond. Frumin Decl. ¶ 31.
	109. A listing of the citations indicates that OSHA accomplished this within a relatively brief period – with all citations occurring between Dec. 22, 2011 and March 23, 2012. Frumin Decl. ¶ 31.
	110. Eight of the violations were subsequently deleted. Of the remaining violations, nine were classified as "Repeat", with initial penalties ranging from $1,200 to a maximum of $5,000. An additional eighty-five were classified as "Other," with an average initial penalty of $740 and average final penalty of $450 (including 31 in which the penalties were dropped entirely). None of the violations were contested, and thirty-nine cases (including four of the higher-penalty Repeat violations) were resolved by the Area Offices through Informal Settlement Agreements. Frumin Decl. ¶ 31.

Plaintiff contends that, if plaintiff is not granted summary judgment as a matter of law for the reasons stated in its memorandum in support of summary judgment, the following are material facts as to which there is a genuine issue of fact for trial:

1. Whether the public disclosure of the high-rate list and ODI data impaired OSHA's recordkeeping or SST enforcement programs.

2. Whether public disclosure of the Form 300A data will lead to noncompliance with OSHA's mandatory recordkeeping and reporting requirements.

3. Whether public disclosure of the Form 300A data will impair OSHA's recordkeeping or SST enforcement programs.

4. Whether OSHA ever considered during the rulemaking process delaying publication of the Form 300A data until the data had been used for targeting employers for inspection.

5. Whether OSHA ever raised the possibility during the rulemaking process that publication of the Form 300A data would impair its enforcement program.

6. Whether OSHA intended to release the Form 300A data as it was collected or inadvertently failed to note throughout the rulemaking process that it only intended to release the data four years after the year to which the data relates.

7. Whether OSHA's resources are so completely devoted to creating a targeting program that it cannot adapt the existing explanatory note posted with the ODI data for the Form 300A data.

8. Whether portions of the Form 300A data are reasonably segregable.

Dated: June 29, 2018

Respectfully submitted,
/s/ Sean M. Sherman
Sean M. Sherman (D.C. Bar No. 1046357)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff